

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	No. CR 18-0092-RAJ
)	
Plaintiff,)	DEFENDANTS' REPLY: MOTION
)	ASSERTING PRIVILEGE, IN PART,
v.)	AND WAIVING PRIVILEGE IN PART
)	REGARDING KARR TUTTLE
BERNARD ROSS HANSEN, and)	DOCUMENTS
DIANE RENEE ERDMANN,)	
)	Hearing Date: February 27, 2019
Defendants.)	

In its opposition to the defense motion asserting privilege to specific Karr Tuttle documents, Dkt. 63, the government erroneously urges this Court to assume that the Mint – for all purposes – was the sole client of Karr Tuttle. In doing so, the government ignores the engagement letter, which is addressed to Mr. Hansen and specifically states, “*In addition* [to the Audit of the Mint], we will advise and counsel regarding ongoing developments related to your business including any government inquiry,” i.e., a criminal investigation, and, “Thank you for engaging Karr Tuttle PC to represent, advise, and counsel *you* and your business.” Ex. 3 (Dkt. 63-3 at 1) (emphasis added). The government’s argument also requires this Court to ignore the reason giving rise to Karr Tuttle’s engagement as counsel for Mr. Hansen and the Mint, i.e., Mr. Fullington’s letter to Mr. Hansen stating that, in Mr. Fullington’s opinion, the Mint “and Ross Hansen are more likely than not engaging in business practices that amount to fraud,

DEFENDANT’S REPLY TO GOVERNMENT’S
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Bernard Hansen et al.; CR18-92RAJ - 1

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misappropriation of customer funds, and Ponzi scheme.” Ex. 4 (Dkt. 63-4 at 1). Finally, the government argues that the decision to ultimately refer Mr. Hansen to another defense attorney is proof that the Mint was the client. However, the change in counsel simply reflects counsel’s compliance with the Rules of Professional Conduct where a potential conflict became an actual conflict of interest.

A. Mr. Hansen and Ms. Erdmann can assert a privilege to communications with the Karr Tuttle attorneys.

The Government suggests that the defendants cannot meet three factors set forth in *United States v. Graff*, 610 F.3d 1148 (9th Cir. 2010). The government’s primary argument is that the Mint, not Mr. Hansen or ultimately Ms. Erdman, was the “client.” Dkt. 66 at 5. Secondly, the government asks the Court to assess whether the communications at issue were not made “in confidence” and whether Mr. Hansen waived privilege relating to the subject matter to which he asserts privilege. *Id.* At 6-7. Mr. Hansen was clearly a client for purposes of the attorney-client relationship.

“A personal attorney-client relationship with corporate counsel can be established by implication or through circumstantial evidence.” *United States v. Trombetta*, No. 13-227, 2015 WL 4406426, *19 (W.D. PA, July 20, 2015). Here, as outlined below, each of the *Graf* factors is satisfied in this case and Mr. Hansen can assert privilege to all of the communications with the Karr Tuttle attorneys or, as he has done, in part. In support of this motion, the defense submits declarations from Mr. Hansen and Ronald Friedman addressing each *Graf* factor. *See* Exhibit 6 (Declaration of Ross Hansen) and Exhibit 7 (Declaration of Ronald Friedman).

1. Mr. Hansen approached Karr Tuttle seeking legal advice.

There really can be little dispute regarding this factor. Mr. Hansen was alarmed by the accusation made in the Fullington memo, so he sought outside legal advice from his prior criminal defense lawyer, who referred him to Ron Friedman, a former United

1 States Attorney, who specializes in regulatory compliance and white collar criminal
2 defense at Karr Tuttle & Campbell. *See* <https://www.karrtuttle.com/ronald-j-friedman/>.

3 2. Mr. Hansen sought advice in his personal capacity rather than his
4 representative capacity.

5 One of the factors addressed by the Court in *Trombetta* is “whether the officer’s
6 personal liability or criminal exposure were discussed with corporate counsel.” *Id.*
7 (citing *In re Beville*, 805 F.2d 120, 124 (3d Cir. 1986)). Without question, Mr. Hansen’s
8 personal liability or criminal exposure were discussed with Karr Tuttle.

9 For example, Mr. Hansen was alarmed by the implication in the Fullington
10 memo that he could be criminally prosecuted just like Mr. Tulving. He went to his prior
11 criminal defense lawyer initially. In his declaration, Mr. Hansen states he clearly sought
12 representation for himself. *See* Exhibit 6 (Hansen Declaration). The Karr Tuttle attorney
13 – privy to the Fullington memorandum -- understood Mr. Hansen was seeking legal
14 advice in his individual capacity and the company, although he viewed them as one-in-
15 the same. Exhibit 7 (Friedman Declaration). The fact that the Mint was identified, along
16 with Mr. Hansen individually, in the retainer agreement and the Mint paid the Karr
17 Tuttle bills does not change the conclusion that Mr. Hansen was seeking advice for
18 himself. The engagement was not limited in scope to the Mint. Moreover, this company
19 was a sole proprietorship. Any expenses that the Mint incurred simply meant that Mr.
20 Hansen’s profits, if any, would have been diminished. An organization can agree to pay
21 the legal fees provided for an individual officer.

22 3. Counsel communicated with Mr. Hansen in his individual capacity, knowing
23 a possible conflict could arise.

24 Karr Tuttle did not have a pre-existing relationship with the Mint. This is not a
25 situation where counsel was providing a variety of legal services related to the
26 operation of the business and was then asked about criminal matters. Mr. Friedman

1 recognized the possibility of a conflict but, because the Mint was basically Mr.
 2 Hansen's alter-ego, he believed no conflict existed. Exhibit 7 (Friedman Declaration).
 3 Once a receiver was appointed to run the Mint, it became an actual conflict which
 4 required new counsel for Mr. Hansen.

5 4. The conversations were confidential.

6 Mr. Hansen was the only person to seek advice from Karr Tuttle. No other
 7 employee was involved in meetings where advice was given. In fact, several email
 8 communications between counsel and Mr. Hansen were in fact, identified as
 9 confidential and "intended only for the use of the intended recipient(s), i.e., Mr.
 10 Hansen. *See, e.g.,* Ex. 6. Nor is there any evidence that he shared the substance of his
 11 communications with Karr Tuttle such that the privilege was waived.

12 Mr. Hansen agrees that the interactions that Dino Vasquez had with Mint
 13 employees are not subject to privilege. However, that does not waive all
 14 communications with counsel or mean that the Audit is not privileged. Counsel is
 15 expected to investigate, interview witnesses, and make observations. The fact that other
 16 people thereby knew an investigation took place does not mean that the private
 17 conversations with counsel are not still subject to privilege.¹

18 5. The subject of the conversations with Karr Tuttle concerned Mr. Hansen's
 19 personal liability.

20 Most corporate counsel privilege cases address circumstances in which the
 21 corporation is not a sole proprietorship. Courts have modified the *Bevill* test (adopted
 22 by the Ninth Circuit, see *Graf*, 610 F.3d at 1159-60) for closely-held corporations. The
 23 First and Tenth Circuits have interpreted the fifth *Bevill* factor flexibly to permit the
 24 individual to assert an individual attorney-client where, "the communication between a
 25

26 ¹ The government asks the Court to inquire into the identity of a person named Taylor identified in one of the emails. Mr. Taylor is a private investigator who likely worked with Mr. Wyatt.

1 corporate officer and corporate counsel specifically focuses upon the individual
 2 officer's personal rights and liabilities Even though the general subject matter of the
 3 conversation pertains to matters within the general affairs of the company.” *In re Grand*
 4 *Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (quoting *In re Grand Jury*
 5 *Proceedings*, 156 F.3d 1038, 1041 (10th Cir.1998)). For example, the test may be met
 6 where the corporate officer discusses his individual liability for jail time arising from
 7 conduct interrelated with corporate affairs “because the officer’s potential prison
 8 sentence is outside the scope of the corporations’ concerns and affairs.” *In re Grand*
 9 *Jury Proceedings*, 156 F.3d at 1041.

10 In this case, the potential criminal liability of the Mint was co-extensive with Mr.
 11 Hansen’s personal liability. Mr. Hansen and the Mint were inseparable.

12 **B. Even if Mr. Hansen’s communications with Karr Tuttle related to the audit**
 13 **are not privileged, the subsequent communications related to the FBI**
 14 **investigation and his personal exposure to criminal prosecution are still**
 15 **privileged.**

16 The government argues that “parsing the specifics of subject matter waiver is
 17 unnecessary” because, according to the government, the holder of the privilege was the
 18 Mint and the Trustee waived privilege. Dkt. 66 at 7. However, the attorney-client
 19 privilege is not an “all or nothing” matter. For example, in *Bevill*, the case which
 20 provides the five-factor test for corporate counsel, the trial court allowed the party
 21 seeking the privilege to demonstrate that some of the communications were personal
 22 and protected communications relating the principals’ personal liabilities. *In re Bevill*,
 23 *Bresler and Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 125 (3rd Cir. 1986); *see also*
 24 *Transcontinental Refrigerated Lines, Inc. v. New Prime, Inc.*, No. 13-2163, 2014 WL
 25 2471936, *7 (M.D. PA, June 3, 2014) (applying *Bevill* test to assess which
 26 communications between a corporate officer and corporate counsel implicated the
 corporation’s privilege, and which implicated the officer’s personal privilege). Thus,

even if the Karr Tuttle's primary relationship was with the corporation, this Court still must "parse the specifics of subject matter waiver."

In this case, Mr. Hansen filed for bankruptcy on April 1, 2016, and a receiver was appointed on April 12, 2016. The communications to which Mr. Hansen does not waive the privilege took place either shortly before or soon after the bankruptcy proceeding was initiated. By then, there could be no confusion regarding the identity of "the client." Furthermore, Diane Erdmann's communications with Mr. Friedman took place well after the trustee took over the Mint. For clarity, the communications to which Mr. Hansen asserts a privilege are set forth below.

Bates pages	Subject	Date	From:	To:	Summary
55343.346	Request	4/19/16	Friedman	Frush, Vasquez	Client referral
55343.335	Conference Yesterday	4/11/16	Wyatt	Hansen, Friedman, Taylor	Criminal investigation
55343.334	NWTM and Ross Hansen	4/7/16	Wyatt	Friedman	Initial contact
55343.330-333	Attorney-client privilege	4/4/16	Friedman	Hansen, Vasquez	Criminal investigation
55343.328-329	Attorney-client privilege	4/3/16	Hansen	Friedman	Criminal investigation
55343.327	Attorney-client	4/3/16	Friedman	Hansen, Vasquez	Criminal investigation
55343.221-226	Tulving Docs	3/29/16	Friedman	Hansen	Tulving prosecution

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C. Diane Erdmann's communications with Karr Tuttle are privileged.

Ms. Erdman's communications with Karr Tuttle are not complicated by the corporate relationship. She is not an owner of the Mint. Thus, there can be no doubt that she was the client of Karr Tuttle.

D. Conclusion.

The government agrees that the Court should determine in camera whether the defense motion asserting privilege in part should be granted. For the reasons stated above, the defendants respectfully request that this Court find that the emails identified above, as well as communications with the Karr Tuttle attorneys related to the criminal investigation, be protected as privileged.

If so granted, the government further asks this Court to provide the parties with direction on how to proceed with potential Karr Tuttle witnesses. Dkt. 66 at 1. If granted, the Court should direct the government to inform its Karr Tuttle witnesses that they cannot discuss these aspects of the representation with the government or introduce the communications at trial.

DATED this 15th day of February, 2019.

Respectfully submitted,

s/ Dennis Carroll

s/ Jennifer E. Wellman

Attorneys for Bernard Ross Hansen
Assistant Federal Public Defenders

s/ Michael G. Martin

Attorney for Diane Renee Erdmann

CERTIFICATE OF SERVICE

I certify that on February 15, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

/s/ Alma R Coria
Senior Legal Assistant